

To: RSP Victim Services Subcommittee on Crime Victims' Rights.

From: Comments of Douglas Beloof, Professor of Law.

Date: January 9, 2014

Good Morning. Thank you for the invitation. The work you are doing is very important and I am honored to be a small part of it. My name is Douglas Beloof, I am a Professor of Law, I was a violent crimes prosecutor for 10 years, I also ran a victim witness division in a district attorney's office in a major metropolitan area, I once was the founding Director of the National Crime Victim Law Institute. You will notice I am also missing a tooth from an outdoor adventure, with any luck this will be replaced shortly, in the meantime I regret you must endure it.

Your task does not resemble either the structure or priorities of public defenders. Defenders interests are in seeing their criminal defendant clients rights honored and enforced. The victim presents an unwelcome other individual whose interests and rights must be accommodated. Nor does your task resemble the structure and priorities of prosecution agencies which are interested in preserving control and authority.

We are all here because the military, and this panel, has an entire military criminal justice system to consider. Moreover, the context of recent Congressional action is to suggest that the military take crime victims, and particularly sexual assault victims', interests very, very seriously.

I am focusing my comments on the broader structural issues that underlie a successful process that includes victims' rights.

The first is that crime victims' rights cannot thrive unless there are lawyers to defend these rights in court. This is not just my view, Congress recognized this when it authorized monies for lawyers in the Crime Victims' Rights Act (CVRA). Unfortunately, these monies were never requested in any agency budgets and the Congressional authorization was never appropriated. Fortunately, there has been a significant development in the military justice system. The Air Force has assigned JAG attorneys to represent victims of sexual assault in criminal proceedings in the military. The other branches of the military are following suit.

Presently, these attorneys represent victims in the limited context of existing rights in the military. The inclusion of the CVRA in the military procedures presents an exciting opportunity to expand the utility of the victim JAG's to serve crime victims in the military. As importantly, it creates the procedural structure to make victims' rights both meaningful and functional. The rights of victims', like all rights, must have certain conditions in order to be robust. Most fundamental is the presence of a lawyer who can assist the victim in exercising their rights and, if the right is abrogated obtain review in a higher court.

As the U.S. Fourth Circuit court of Appeals opined, when it allowed a sexual assault

victim and her counsel an interlocutory appeal of an adverse rape shield in the trial court: “No ...party (other than the victim) in the evidentiary proceeding shares these interests to the extent they might be viewed as a champion of victims’ rights.”

The court was stating something every law student knows. Rights must be exercised and enforced by the person with the interest in the rights. For victims’ rights this means the victim. And, for victims, most of whom have no legal training, this means a lawyer to defend their rights. For sexual assault victims in the military, such legal representation could be made available for enforcement of the CVRA. I would urge this committee to recommend this natural progression. That is to say that these JAG attorneys, who already represent victims’ interests in the limited rights presently available, represent victims in exercising and enforcing their CVRA rights.

The enforcement mechanism of these rights is critical. Here not only is it important to give the victims’ lawyers the ability to seek review, it is critical that the military courts have a remedy when the trial panel denies the right. As Chief Justice Marshall opined the most famous of all Supreme Court cases, *Marbury vs Madison*: Rights without remedy are no rights at all. Critical is the ability of military appellate courts to be able to fashion remedies. This is the proper role of those courts. For this to happen, rights violation must be able to get to the courts *and the courts must be able to remedy them*. I would also direct you to the legislative history of the sponsors of the CVRA Sens. Feinstein and Kyl, in which they expressed their intent that remedy be provided in all cases.

Yet, in the civilian court appellate opinions, no meaningful remedy for CVRA rights is the trend. As interpreted by a majority of federal circuit courts, with a few notable exceptions, enforcement of the CVRA has become extremely limited. If the goal of the committee is to minimize victims’ rights, the most effective way to do so is to adopt the current remedy in the CVRA, as interpreted by a majority of federal courts. That regular mandamus remedy will ensure that the rights are largely ineffective for victims, as there will rarely, if ever, be meaningful enforcement. The present civilian enforcement procedure in the CVRA, as interpreted by a majority of federal circuit courts, is a fundamental failure for the victims in those cases. I cannot recommend it to you.

If the military wants meaningful enforcement, I strongly recommend that varying review procedures be used for each type of CVRA rights violation. Some of these would be procedures already well known. For example, pretrial rights could be enforced by expedited interlocutory appeal. Other rights, that do not fit so well within existing review mechanisms could be bundled under a title, such as “Victims’ Special Action.” For example, such a procedure could be used for rights that are available pre-charging or rights that arise after the trial has started but before sentencing. These violations would be expedited to military appellate courts. Such an approach would allow the military courts to enforce the rights.

I have first described the need for victim lawyers, an initiative the military is already undertaking. Second, the need for varying review procedures for distinct rights to both get cases into the appellate courts and allowing these courts the freedom to fashion appropriate remedies. The third CVRA issue I would like to address is the mechanics of implementation of both the

rights and review and remedy. There are two clear choices.

Choice one is to recommend that the CVRA be fully integrated into the procedural rules. To set out the CVRA in the Rules provides clarity to practitioners and judges. It provides greater accessibility to JAG's who have not worked with the rights before. I strongly advocate integrating the CVRA into the military rules as long as such integration is not used as an opportunity to minimize or narrow the rights.

Should this committee's recommendation be integration, I suggest to those who ultimately undertake this task to contact Professor Paul Cassell at Utah. Mr. Cassell is a former federal judge, former prosecutor in the USDOJ, and has written an excellent article or two on how to integrate the CVRA into the Federal Rules. I expect his ideas are readily adaptable to the Military Code. Additionally, I would recommend consulting Meg Garvin of your committee, who was involved in the effort in Oregon. I would recommend looking at the procedures in Oregon, which is the state that has most comprehensively established procedures around victims' rights.

The other choice is to not to integrate the CVRA into the rules, and instead, leave implementation to the appellate courts. This has the distinct disadvantage of being very slow in evolving. Implementation is moved from policy makers to the bench.

From my perspective, there is a wonderful opportunity for the military to readily surpass the civilian justice system in the way victims' rights work procedurally. The military already surpassed the civilian system by providing trained lawyers to assert sexual assault victims rights. However lawyers are not enough, the procedural tools for lawyers and judges must exist if the rights are to be meaningful. This opportunity could easily be squandered, reduced to form over substance.

In relation to procedures specifically for sexual assault, I would urge this panel to recommend that sexual assault victims be able to seek review of both the denial of a rape shield ruling and the denial of any other evidentiary privilege the victim might have. This is not provided for in the CVRA.

I have also been asked to provide a perspective on restitution. I understand restitution does not presently exist in the military. Restitution is a fundamental part of criminal punishment in the civilian systems. The solution for restitution is simple enough if the perpetrator remains in the military. Have the prosecution or victim present restitution information it to the court, get an order, and deduct restitution from their pay and give it to the victim.

For those sentenced to incarceration who will receive a dishonorable discharge, the restitution issue is complex. If it is possible to turn a military court restitution order into a civil judgment that the victim could enforce from then on that would be ideal. Further, the prosecution could be empowered, post judgment, to seize assets of the convicted soldier which ultimately, would be converted to restitution.

Where the military has paid for victims' hospital, mental health counseling or other

expenses, the military itself should consider seeking restitution for itself.

Finally, the order of payment of offender financial obligations is important. Victim restitution should be paid before any other types of fines or fees are collected.

Thank you very much for the opportunity to speak with you today.